

Office - Supreme Court, U.S.  
FILED  
JUN 18 1984  
ALEXANDER L STEVENS,  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

No. 83-1799

BAY HEAD IMPROVEMENT ASSOCIATION,  
*Petitioner,*

v.

VIRGINIA MATTHEWS and STANLEY VAN NESS,  
*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEW JERSEY

---

RESPONDENTS' BRIEF IN OPPOSITION

---

JOSEPH H. RODRIGUEZ  
PUBLIC ADVOCATE

RICHARD E. SHAPIRO\*  
DIVISION OF PUBLIC  
INTEREST ADVOCACY

DEPARTMENT OF THE PUBLIC  
ADVOCATE  
RICHARD J. HUGHES JUSTICE  
COMPLEX  
CN-850  
TRENTON, NEW JERSEY 08625  
(609) 292-1693  
*Attorneys for Respondents*

\* Counsel of Record

---

THE COPY CENTER, INC., 615 Chestnut Street, Philadelphia, PA 19106 (215-928-1900)

**BEST AVAILABLE COPY**

QUESTIONS PRESENTED

1. Whether the Court should review a case from the Supreme Court of New Jersey that neither raises nor discusses any federal constitutional issues?
2. Whether a quasi-public association, whose activities parallel those of a municipality in the operation of a beachfront, may limit beach access solely to residents of that municipality under the public trust doctrine established by the state courts of New Jersey.



TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED . . . . .	i
COUNTERSTATEMENT OF THE CASE . . . . .	2
REASONS FOR DENYING THE WRIT	
I. THE SUPREME COURT OF NEW JERSEY HAS NOT CONSIDERED OR DETERMINED ANY FEDERAL CONSTITU- TIONAL QUESTIONS IN ITS DECISION . . . . .	8
II. CERTIORARI SHOULD BE DENIED BECAUSE (1) THE BHIA HAS NO STANDING TO ASSERT THE RIGHTS OF PRIVATE PROPERTY OWNERS WHO DID NOT SEEK CERTIORARI, AND (2) THE SUPREME COURT OF NEW JERSEY PROPERLY APPLIED THE STATE LAW PUBLIC TRUST DOCTRINE TO A QUASI- PUBLIC CORPORATION . . . . .	13
CONCLUSION. . . . .	18



TABLE OF CITATIONS

	<u>Page</u>
<u>CASES</u>	
<u>Beck v. Washington,</u> 369 U.S. 541, (1962) . . . . .	11
<u>Borough of Neptune City v.</u> <u>Borough of Avon-By-The-Sea,</u> 61 N.J. 296, 294 A.2d 47 (1972) . . . . . . . . .	16
<u>Cardinale v. Louisiana,</u> 394 U.S. 437 (1969) . . . . .	8
<u>Hanson v. Denckla,</u> 357 U.S. 235 (1958) . . . . .	15
<u>Liberty Warehouse Co. v. Burley</u> <u>Tobacco Growers' Co-op,</u> 276 U.S. 71 (1928) . . . . .	15
<u>Live Oak Water Users' Ass'n v.</u> <u>Railroad Commission,</u> 269 U.S. 354 (1926) . . . . . . .	13
<u>Lynch v. New York ex rel.</u> <u>Pierson,</u> 293 U.S. 52 (1934) . . . . . . .	13
<u>Street v. New York,</u> 394 U.S. 576 (1969) . . . . .	9
<u>Van Ness v. Borough of Deal</u> 78 N.J. 174, 393 A.2d 571 (1978). . . . . . . . .	16, 17
<u>STATUTES</u>	
N.J.S.A. 52:27E-2 . . . . .	1
N.J.S.A. 52:27E-29 . . . . .	1



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

---

No. 83-1799

---

BAY HEAD IMPROVEMENT ASSOCIATION,  
PETITIONER,  
v.  
VIRGINIA MATTHEWS AND STANLEY VAN NESS,  
RESPONDENTS.

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEW JERSEY

---

RESPONDENTS' BRIEF IN OPPOSITION

---

The Respondents, Virginia Matthews and Stanley Van Ness, the Public Advocate of the State of New Jersey,<sup>1</sup> respectfully request that

---

<sup>1</sup> The Public Advocate is an independent cabinet-level official in the State of New Jersey, N.J.S.A. 52:27E-2, who is authorized to "represent the public interest in such administrative and court proceedings . . . as [he] deems shall best serve the public interest." N.J.S.A. 52:27E-29. Stanley C. (Footnote continued on next page)



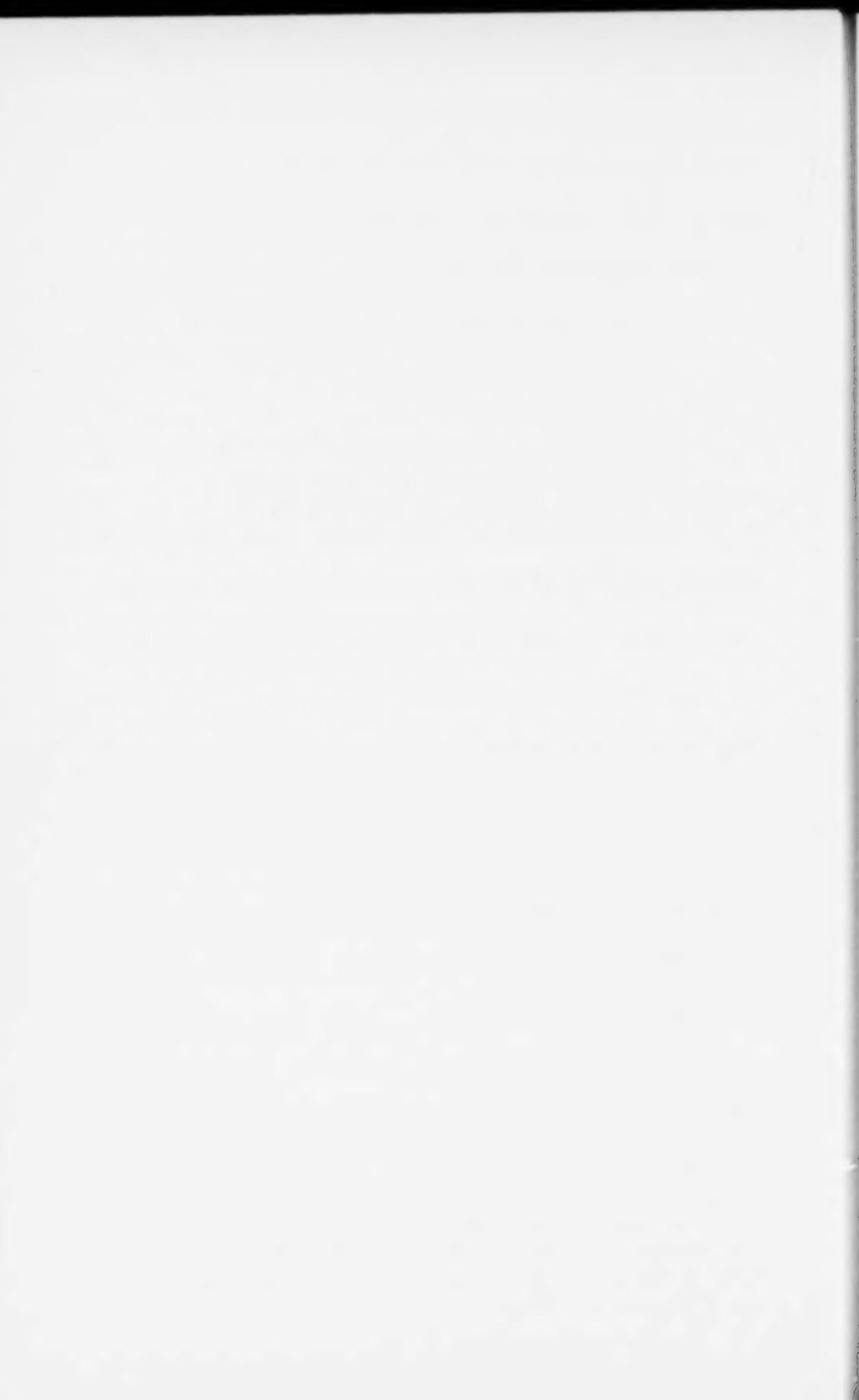
this Court deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of New Jersey in this case. That opinion is reported at 95 N.J. 306, 471 A.2d 355 (1984)

COUNTERSTATEMENT OF THE CASE

The Borough of Bay Head (Bay Head) is a New Jersey seashore community with a beach that runs along its entire length adjacent to the Atlantic Ocean. Pet. App. 5a. The Bay Head Improvement Association (BHIA) is a non-profit corporation that was founded in 1910. There are between 4,800 to 5,000 members in the Association, Pet. App. 7a, and membership is generally limited to residents of Bay Head. Pet. App. 6a.

The Association's purpose is to supervise  
(Footnote 1 continued from previous page)

Van Ness formerly served as Public Advocate from 1974 to February 10, 1983, and was in office when the Public Advocate intervened in these proceedings. Joseph H. Rodriguez, the present Public Advocate, was appointed in February 1983.



the beach for the residents of Bay Head. Pet. App. 7a. Pursuant to this objective, the Association restricts use of the beach to members (i.e., residents of Bay Head) between 10:00 a.m. and 5:30 p.m. during the summer months. Pet. App. 6a. However, these restrictions are limited to the dry sand area of the beach, since no attempt is made "to stop anyone from occupying the terrain east of the high water mark" (i.e., the ocean-side of the beach). Pet. App. 7a.

Since April 1974, non-residents of Bay Head have been seeking through the courts of New Jersey to obtain access to the Bay Head beach. This protracted litigation has been based on the public's right under the public trust doctrine -- a common law principle that has evolved in the New Jersey state courts -- to use the limited beachfront areas in New Jersey.

When the case reached the Supreme Court of New Jersey, the principal issue was whether



"ancillary to the public's right to enjoy the tidal land, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body." Pet. App. 3a. In resolving this question, the Court first explored the evolution of the "public trust" doctrine in New Jersey from the early common law to a contemporary concept that entitles the public to use beachfront property for bathing, swimming and other shore activities. Pet. App. 8a-14a. Then, the Court discussed the public's right in privately-owned dry sand beaches, concluding that "the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary." Pet. App. 18a. However, in the present case, the Court did not resolve the precise relationship between private ownership and the public trust doctrine:



Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand. Pet. App. 18a.

Finally, the New Jersey Supreme Court reviewed state law principles relating to non-profit corporations, like the BHIA, and distilled the principle "that a non-profit association that is authorized and endeavors to carry out a purpose serving the general welfare of the community and is a quasi-public institution holds in trust its powers of exclusive control in the areas of vital public concern." Pet. App. 21a. Applying these principles to the BHIA, the court determined that "[t]he Association's activities paralleled those of a



municipality in its operation of the beach-front." Pet. App. 22a. Accordingly, the state supreme court concluded that "membership in the Association must be open to the public at large." Pet. App. 24a. This conclusion was grounded in the concern for preserving the public good -- a traditional element of the state's police power:

There is no public beach in the Borough of Bay Head. If the residents of every municipality bordering the Jersey shore were to adopt the Bay Head policy, the public would be prevented from exercising its right to enjoy the foreshore. The Bay Head residents may not frustrate the public's rights in this manner. Pet. App. 24a.

Significantly, the Court limited its holding to establishing that "a right of access to the beach is available over the quasi-public lands owned by the Association, as well as the right to use the Association's upland dry sand." Pet. App. 26a. (emphasis added). The court explicitly reserved judgment on the rights of owners of private



beachfront property:

The record in this case makes it clear that a right of access to the beach is available over the quasi-public lands owned by the Association, as well as the right to use the Association's upland dry sand. It is not necessary for us to determine under what circumstances and to what extent there will be a need to use the dry sand of private owners who either now or in the future may have no leases with the Association. Resolution of the competing interests, private ownership and the public trust, may in some cases be simple, but in many it may be most complex. In any event, resolution would depend upon the specific facts in controversy.

None of the foregoing matters were fully argued or briefed, the disputes concerning rights in and to private beaches having been most general. Pet. App. 26a.  
(emphasis added).

The state court, therefore, affirmed the judgment dismissing the individual property owners, and reversed the judgment denying relief as to the Association. Pet. App. 27a.



### REASONS FOR DENYING THE WRIT

#### I. THE SUPREME COURT OF NEW JERSEY HAS NOT CONSIDERED OR DETERMINED ANY FEDERAL CONSTITUTIONAL QUESTIONS IN ITS DECISION

The most obvious reason why certiorari should be denied in this case is that the Supreme Court of New Jersey has not considered or determined any federal constitutional question in its opinion. Nor has the BHIA's petition for writ of certiorari even set forth the manner in which the federal questions was raised in the state courts. Consequently, petitioner has not satisfied the threshold requirement of presenting in its petition a federal question for the Court to review.

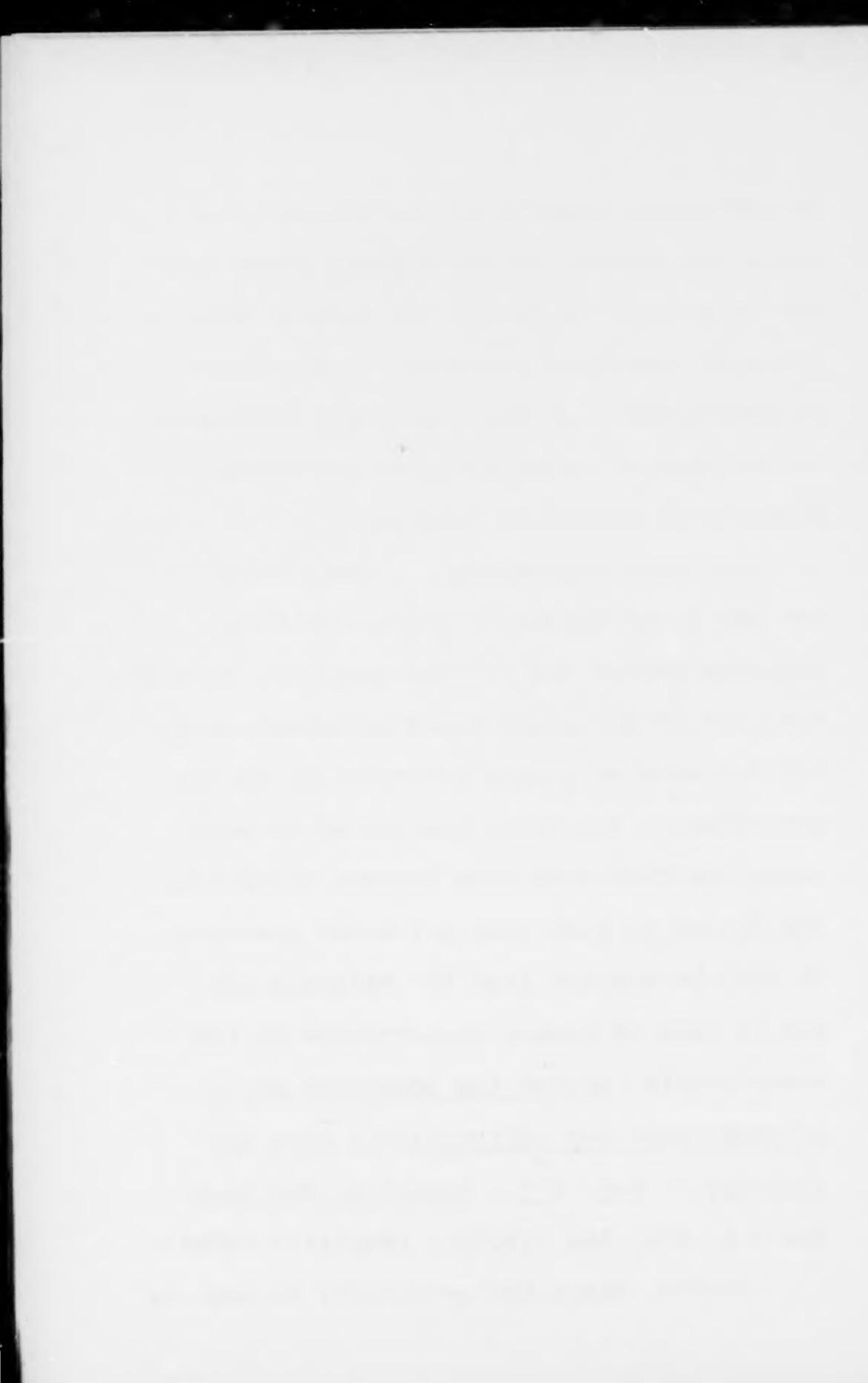
It has long been established that this Court is not vested with jurisdiction over a state court decision unless a federal question was raised and decided in the state courts. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). The jurisdictional factor is



of particular concern in the present case, since the opinion of the highest state court not only fails to decide the federal constitutional questions presented to the Court by petitioner, but also omits any reference to the federal constitutional questions purportedly raised by this case.

In these circumstances, the petitioner has the heavy burden of showing that he properly raised the federal question, so that the lack of any state court adjudication is not for want of proper presentation by the petitioner. The Court has stated on many occasions that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." See, e.g., Street v. New York, 394 U.S. 576, 582 (1969). (emphasis added).

Indeed, since the petitioner is seeking



review of a state court decision, under Rule 21.1(h) the petitioner must, in the statement of the case, "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised" and "the method or manner of raising them and the way in which they were passed upon by the court." In fact, the petitioner candidly admits that the Supreme Court of New Jersey relied on "state action doctrines" in fashioning its decision. Pet. at 16.

When viewed in this context, it is evident that the BHIA has wholly failed to discharge its burden of demonstrating that there is a federal question before the Court to review. As pointed out above, the opinion of the Supreme Court of New Jersey does not discuss any federal questions. Rather, the state court's opinion is exclusively devoted to an explanation of the common law evolution of the New Jersey public trust doctrine,



and the application of this right of the public to the dry sand beach area owned by a quasi-public body. The opinion is therefore an exercise in the interpretation and application of a state law doctrine, without any consideration of the relationship of the public right to the Fifth and Fourteenth Amendments. Under these circumstances, this Court should not, in the first instance, consider the federal questions raised by the petitioner. Cf. Beck v. Washington, 369 U.S. 541, 549-554 (1962).

Moreover, the Supreme Court of New Jersey was very careful in crafting an opinion that avoids the broad federal constitutional issues asserted by the petitioner:

It is not necessary for us to determine under what circumstances and to what extent there will be a need to use the dry sand of private owners who either now or in the future may have no leases with the Association. Resolution of the competing interests, private ownership and the public trust, may in



some cases be simple; but in  
many it may be most complex.  
In any event, resolution  
would depend upon the specific  
facts in controversy.

None of the foregoing mat-  
ters were fully argued or  
briefed, the disputes concern-  
ing rights in and to private  
beaches having been most  
general. Pet. App. 26a. (em-  
phasis added).

Therefore, petitioner's efforts to seek review in this Court of issues that the state court did not undertake to decide, and indeed expressly reserved for judgment in a future case, should be unavailing.

Furthermore, nowhere in the entire BHIA petition is there any discussion of when or how the federal issues were raised or passed on in the state courts. Consequently, the petitioner has fallen far short of its burden of demonstrating that the issues



were properly raised below.<sup>2</sup> These reasons, standing alone, warrant the denial of the petition.

II. CERTIORARI SHOULD BE DENIED  
BECAUSE (1) THE BHIA HAS NO  
STANDING TO ASSERT THE RIGHTS  
OF PRIVATE PROPERTY OWNERS  
WHO DID NOT SEEK CERTIORARI,  
AND (2) THE SUPREME COURT OF  
NEW JERSEY PROPERLY APPLIED  
THE STATE LAW PUBLIC TRUST  
DOCTRINE TO A QUASI-PUBLIC  
CORPORATION

---

Assuming the Court determines that a federal constitutional question can be extracted from the New Jersey Supreme Court's opinion, certiorari should still be denied. The petition for writ of certiorari has been filed by the Bay Head Improvement Association, a non-profit organization. No private land-owners purportedly affected by the decision of

---

<sup>2</sup> This Court has ordinarily not permitted a petitioner to use briefs filed in the state courts to establish that a federal question was raised. Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54 (1934). Live Oak Water Users' Ass'n v. Railroad Commission, 269 U.S. 354, 357-58 (1926).



the New Jersey Supreme Court have separately sought review in this Court, even though such individuals were defendants below. Pet. App. 4a. Indeed, since the judgment of dismissal against the individual property owners was affirmed by the state court, Pet. App. 27a, there is no live controversy affecting these parties.

However, as mentioned above, in determining that the public was entitled to access to the Bay Head beach, the Supreme Court of New Jersey explicitly reserved judgment on the relationship between private ownership and the public trust doctrine. Pet. App. 26a.

Instead, the Court concluded on the basis of the factual record developed in the course of lengthy state court proceedings, that "a right of access to the beach is available over the quasi-public lands owned by the Association, as well as the right to use the Association's upland dry sand." Pet.



App. 26a. (emphasis added). This finding, in turn, was predicated on the state court's assessment of a record which established that "[t]he Association's activities paralleled those of a municipality in its operation of the beachfront." Pet. App. 22a.

As the Court observed:

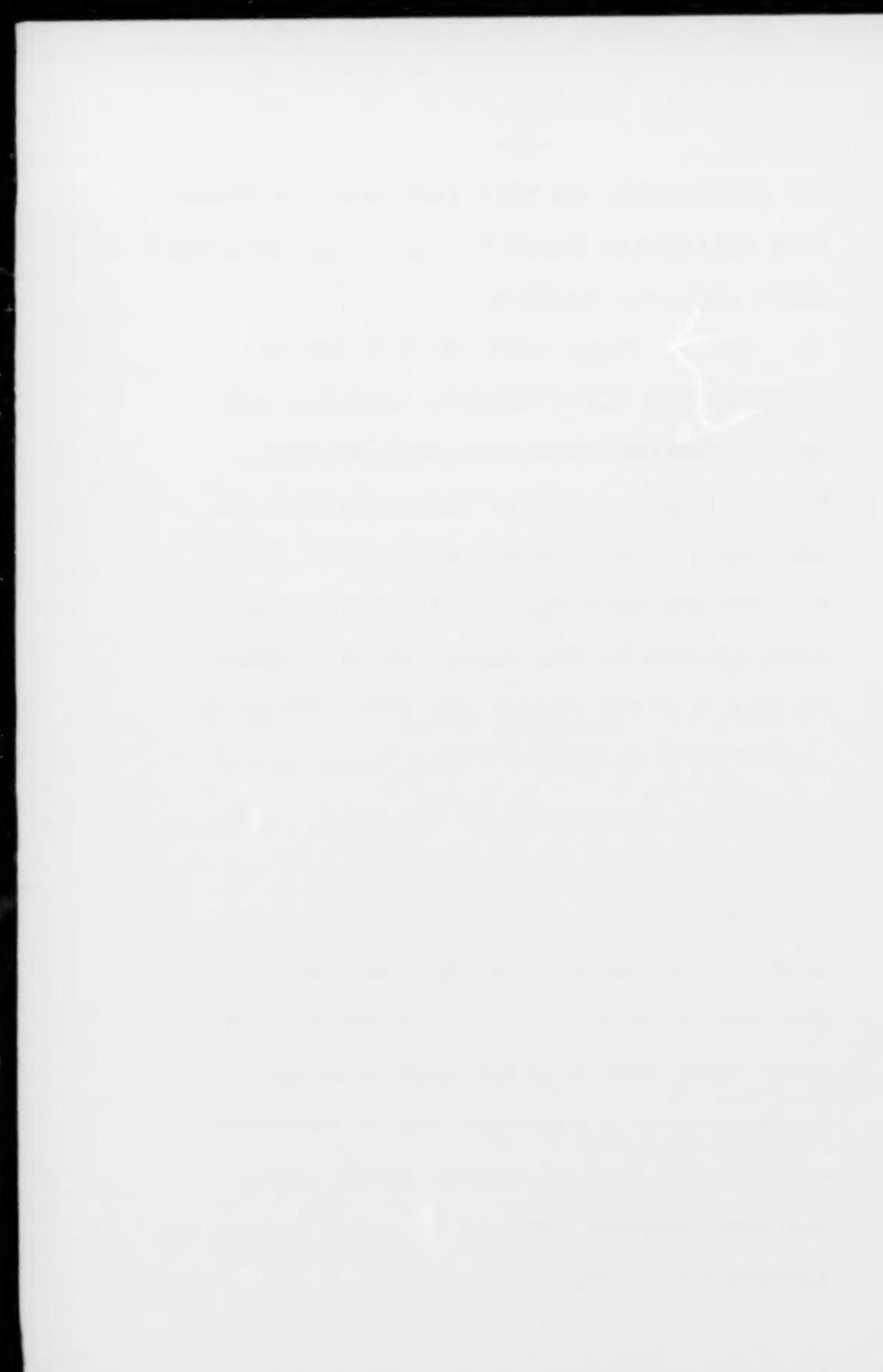
When viewed in its totality -- its purposes, relationship with the municipality, communal characteristics, activities and virtual monopoly over the Bay Head beachfront -- the quasi-public nature of the Association is apparent. Pet. App. 23a.

Thus, to the extent that the petitioner is urging this Court to consider the federal constitutional rights of a private owner of beachfront property, the BHIA's efforts are misplaced, for it "cannot invoke the jurisdiction of this Court to vindicate the right of a third party." Hanson v. Denckla, 357 U.S. 235, 244 (1958), citing, inter alia, Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op, 276 U.S. 71, 88 (1928).



The petitioner, in this instance, is therefore asking the Court to render an impermissible advisory opinion.

On the other hand, BHIA's own objections to the state court's decision are hardly federal constitutional matters. Rather, the New Jersey Supreme Court, on the basis of a factual record that demonstrated the BHIA was no different from a municipality in the operation of a beach, applied a state common law doctrine established in a series of state cases to the beachfront activities of the BHIA. See, e.g., Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978); Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 47 (1972). In short, the Court held that a group that acts and operates like a municipality in managing beachfront property cannot evade state law requirements imposed on other public or quasi-public bodies.



Furthermore, the state supreme court has clearly stated that the application of the public trust doctrine "does not create a public right where none existed previously. It merely gives recognition to the existence of such right." Van Ness v. Borough of Deal, 78 N.J. at 181, 393 A.2d at 574. Therefore, the vindication of the rights of the public is not, as BHIA would have the Court believe, synonomous with the curtailment of private property rights.

In sum, the federal questions asserted by the petitioner are not raised on the present record. A careful review of the opinion of the Supreme Court of New Jersey reveals that the decision applies state law principles to a new set of factual circumstances. Such a determination clearly does not merit review in this Court.



-18-

CONCLUSION

For the reasons mentioned above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH H. RODRIGUEZ  
PUBLIC ADVOCATE OF NEW JERSEY

BY:

---

RICHARD E. SHAPIRO  
DIRECTOR  
DIVISION OF PUBLIC INTEREST  
ADVOCACY

COUNSEL FOR RESPONDENTS